Filed 3/18/19 Hilton v. Los Angeles Dept. of Water and Power CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

PATRICK HILTON, Plaintiff and Appellant, v. LOS ANGELES DEPARTMENT OF WATER AND POWER, Defendant and Respondent.	B282167 (Los Angeles County Super. Ct. No. BC577388)

APPEAL from a judgment of the Superior Court of Los Angeles County, Monica Bachner, Judge. Affirmed.

Patrick Hilton, in pro. per., for Plaintiff and Appellant.

Michael N. Feuer, City Attorney, Joseph A. Brajevich, General Counsel for Department of Water and Power, Anat Ehrlich, Assistant City Attorney, and Heather E. Jones, Deputy City Attorney, for Defendant and Respondent.

INTRODUCTION

Patrick Hilton, an employee of the Los Angeles Department of Water and Power (DWP), appeals from the judgment entered after the trial court granted DWP's motion for summary judgment on Hilton's complaint for racial discrimination and related employment claims. Hilton contends the trial court erred in ruling on several matters, including his requests for judicial notice of certain documents and for leave to amend his complaint. He also contends that the trial court lacked jurisdiction to rule on DWP's motion for summary judgment and that counsel for DWP committed attorney misconduct. Because Hilton's contentions lack merit, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Hilton Files Complaints with DFEH*

In April 2013 Hilton, who is African American, filed a complaint with the California Department of Fair Employment and Housing (DFEH) alleging he experienced discrimination, harassment, and retaliation at DWP because of his color and race. Hilton identified several alleged instances of such conduct, beginning with an incident in June 2011 when his team leader yelled and cursed at him and called him "just a meter reader," which Hilton reported to his supervisor. Other alleged instances occurred in September 2011, when a supervisor required Hilton to sign a "Work Instructions" memorandum addressing Hilton's quarrel with a co-worker, and in October 2012, when Hilton received a five-day suspension because of a November 2011 confrontation with a DWP customer.

In July 2013 Hilton filed a second DFEH complaint that alleged another incident of discrimination, harassment, and retaliation. He alleged that in April 2013, after he filed his first DFEH complaint, a supervisor improperly disciplined him by delivering a written "Notice to Correct Deficiencies" that admonished Hilton for a December 2012 incident in which, during an appointment to review his personnel file, Hilton became loud and upset, made employees in the Personnel Services Office "feel very uncomfortable," and caused them to call security. In October 2013 DFEH notified Hilton it was closing the case generated by his second complaint and investigating all charges as part of the previously filed proceeding.

In April 2014 DFEH informed Hilton it was closing his case because of insufficient evidence and notified him of his right to sue. Hilton unsuccessfully appealed. The letter informing him of the decision on appeal explained that most of the incidents he alleged occurred outside the one-year statute of limitations, that DWP had provided evidence of a non-discriminatory reason for suspending him in October 2012, and that, despite requests from DFEH, he had failed to submit evidence to support his remaining allegations.

B. *Hilton Files This Action, and the Trial Court Grants DWP's Motion for Summary Judgment*

In April 2015 Hilton filed this action against DWP for violations of the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.).[1] The operative second amended complaint asserted causes of action for racial discrimination (§ 12940,

---

[1] Undesignated statutory references are to the Government Code.

subd. (a)), failure to prevent racial discrimination (§ 12940, subd. (k)), and retaliation (§ 12940, subd. (h)). Hilton's supporting allegations concerned the same incidents he alleged in his DFEH complaints, plus an April 2014 incident in which a supervisor allegedly discriminated and retaliated against him by removing him from a volunteer program in which he helped train new meter readers.

In April 2017 the trial court granted DWP's motion for summary judgment.[2] The court identified four allegedly actionable incidents: those concerning the September 2011 "Work Instructions" memorandum,[3] which the court considered in conjunction with Hilton's June 2011 problems with his team leader; the October 2012 suspension; the April 2013 Notice to Correct Deficiencies; and the April 2014 removal of Hilton from the volunteer program. Addressing each of these incidents in relation to each of Hilton's causes of action, the court ruled that DWP met its burden of presenting facts to negate an essential element of the cause of action or to establish a defense and that Hilton failed to show a triable issue of material fact on any of his causes of action. The trial court entered judgment in favor of DWP, and Hilton timely appealed.

---

[2] Although Hilton was represented by counsel when he filed his second amended complaint, he represented himself in opposing the motion for summary judgment.

[3] The trial court referred to this as the "August 2011 'Work Instruction' Memo," presumably because the memorandum concerned conduct that occurred in August of that year.

DISCUSSION

A. *The Trial Court Did Not Abuse Its Discretion in Ruling on Hilton's Request for Judicial Notice*

In support of his opposition to the motion for summary judgment, Hilton asked the trial court to take judicial notice of several documents and an audio recording that, according to him, related to the November 2011 incident for which DWP suspended him in October 2012. The documents were a transcript of the telephone call in which a DWP customer reported the incident, angrily describing how Hilton pushed and argued with her as she retrieved her dog, which had been barking at him; a copy of a DWP "Practical Dog Safety Training" manual; and a copy of an intradepartmental email addressing DWP's "Field Confrontation Procedures." The audio recording was of the telephone call that had been transcribed. Hilton contends the trial court erroneously denied his request for judicial notice of these three documents and the recording, which he suggests "would have vindicated [him] from the false allegations" made by DWP, "thereby creating a triable issue of fact."

Evidence Code section 453 provides, in relevant part, "[t]he trial court shall take judicial notice of any matter specified in Section 452 if a party requests it and . . . [f]urnishes the court with sufficient information to enable it to take judicial notice of the matter." Evidence Code section 452 authorizes the court to take judicial notice of, among other things, "[r]egulations . . . issued by or under the authority of . . . any public entity in the United States," "[f]acts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute," and "[f]acts and

propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (*Id.* at § 452, subds. (b), (g), (h).) "We review the trial court's ruling on the request for judicial notice for abuse of discretion." (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 264; see *CREED-21 v. City of San Diego* (2015) 234 Cal.App.4th 488, 520 ["we affirm the ruling unless the information provided to the trial court was so persuasive that no reasonable judge would have denied the request for judicial notice"].)

The record reflects that the trial court actually granted Hilton's request for judicial notice of the Practical Dog Safety Training manual and the email regarding Field Confrontation Procedures, but not "the truth of the matters asserted within the documents" or the transcript or recording of the telephone call. Hilton makes no attempt to explain how any of the matters of which the court declined to take judicial notice falls within Evidence Code section 452. (See *Herrera v. Deutsche Bank National Trust Co.* (2011) 196 Cal.App.4th 1366, 1374-1375 [ordinarily a matter is subject to judicial notice only if it "is reasonably beyond dispute," and even if a document is subject to judicial notice, the truth of its contents is "disputable"].) Hilton has not demonstrated the trial court abused its discretion in declining to take judicial notice of those matters. (See *Shenouda v. Veterinary Medical Bd.* (2018) 27 Cal.App.5th 500, 512 ["[b]ecause judgments of the trial court are presumed to be correct, the appellant bears the burden to affirmatively demonstrate error"].)

B. *The Trial Court Did Not Abuse Its Discretion in Denying Hilton's Request To Amend His Second Amended Complaint*

Hilton filed his second amended complaint in March 2016. In March 2017 he filed a motion for leave to file a third amended complaint, which he asserted would remove his cause of action for racial discrimination and "updat[e]" the remaining causes of action with "certain facts [that] were not mentioned in the original complaint." The hearing on the motion for leave to amend was scheduled for April 19, 2017, the day of the hearing on the motion for summary judgment. On April 6, 2017, however, Hilton filed a "notice of cancellation," taking his motion off calendar. Then, during the April 19, 2017 hearing on DWP's motion for summary judgment, Hilton referred to his motion for leave to amend and stated, "I would like a third amended complaint." Argument continued without the court responding directly to Hilton's request. At the conclusion of the hearing, after the court had granted the motion for summary judgment, Hilton asked: "As far as my motion to [sic] leave . . . there's no way possible I can amend my complaint?" The court responded: "I've granted the summary judgment, sir." Construing his exchanges with the court as a denial of a motion for leave to amend his second amended complaint, Hilton contends the court erred in doing so.

"'"[T]he trial court has wide discretion in allowing the amendment of any pleading [citations], [and] as a matter of policy the ruling of the trial court in such matters will be upheld unless a manifest or gross abuse of discretion is shown. [Citations.]"' [Citation.] Nevertheless, it is also true that courts generally should permit amendment to the complaint at any stage of the

proceedings, up to and including trial. [Citations.] But this policy applies "'only '[w]here no prejudice is shown to the adverse party.'" [Citation.] Moreover, "'even if a good amendment is proposed in proper form, unwarranted delay in presenting it may—of itself—be a valid reason for denial.'" [Citations.] Thus, appellate courts are less likely to find an abuse of discretion where, for example, the proposed amendment is "'offered after long unexplained delay . . . or where there is a lack of diligence.'" (*Melican v. Regents of University of California* (2007) 151 Cal.App.4th 168, 175; see Code Civ. Proc., §§ 473, subd. (a)(1), 576.)

In Hilton's written motion for leave to amend (which he withdrew), Hilton did not explain his year-long delay in seeking to amend his second amended complaint and suggested only vaguely the effects of the proposed amendment. Nor did he provide a copy of the proposed amended pleading. He thus failed to satisfy the basic requirements for such a motion. (See Cal. Rules of Court, rule 3.1324.) He did nothing to cure those defects at the hearing on the motion for summary judgment, nor did he offer to explain the additional delay resulting from his taking his motion off calendar. He does not address those defects on appeal. And, because he still does not specify how he would have amended his second amended complaint (stating only "[t]here were other causes of action that should have been added, in order to properly address the unlawful conduct that occurred"), he has not shown DWP would suffer no prejudice as a result of his obtaining leave to amend. The trial court did not abuse its discretion.

C. *The Trial Court Did Not Err in Vacating the Hearing on Hilton's Motion To Compel Discovery Responses*

After granting DWP's motion for summary judgment, the trial court vacated all future hearings scheduled in the case, including a May 26, 2017 hearing on a motion by Hilton to compel further discovery responses. Hilton argues the court erred in vacating the May 26 hearing. By not objecting to the trial court's ruling, however, he forfeited the issue on appeal. (See *Santa Clara Waste Water Co. v. Allied World National Assurance Co.* (2017) 18 Cal.App.5th 881, 884, fn. 2 ["failure to object and give the trial court an opportunity to consider an issue forfeits the issue on appeal"].) And even if he had preserved the issue, he does not provide any authority suggesting the court erred.

D. *The Trial Court Had Jurisdiction To Rule on the Motion for Summary Judgment*

Hilton contends the judgment in favor of DWP is "void" because the trial court "had no jurisdiction over the . . . summary judgment" motion. He appears to suggest the court lacked jurisdiction to rule on the motion because counsel for DWP filed a declaration in support of the motion, which he argues was improper, and because the DWP customer involved in the November 2011 incident did not submit "a sworn affidavit," testify, or become a party to the case.

Hilton does not explain, however, how the filing of a declaration by counsel for DWP deprived the trial court of jurisdiction. Nor does Hilton explain how the absence of the DWP customer from the case deprived the trial court of jurisdiction. He hints the customer may have been an

"indispensable party." She was not. (See *Tracy Press, Inc. v. Superior Court* (2008) 164 Cal.App.4th 1290, 1298 [generally, """[a] person is an indispensable party if his or her rights must necessarily be affected by the judgment"""].) And even if she were, her absence did not deprive the court of jurisdiction to rule on DWP's motion for summary judgment. (See *id.* at pp. 1298-1299 [""[f]ailure to join an 'indispensable' party is not 'a jurisdictional defect' in the fundamental sense; even in the absence of an 'indispensable' party, the court still has the power to render a decision as to the parties before it which will stand[;] [i]t is for reasons of equity and convenience, and not because it is without power to proceed, that the court should not proceed with a case where it determines that an 'indispensable' party is absent and cannot be joined"""].) The trial court did not lack jurisdiction to rule on the motion for summary judgment.

E. *Hilton Has Not Shown Attorney Misconduct or a Fraud on the Court*

Finally, Hilton attacks the judgment on the ground that counsel for DWP engaged in "attorney misconduct" amounting to a "fraud upon the court." Specifically, he complains counsel for DWP submitted in support of the motion for summary judgment only one (favorable) page of the Practical Dog Safety Training manual and "concealed or suppressed" the remaining 30 pages, which he maintains contained "critical evidence . . . that would have vindicated" him. He also complains counsel for DWP "conspire[d] with [DWP] in the concealment or suppression of evidence" favorable to him when DWP "removed . . . the 'Work Instructions' and the 'Notice to Correct Deficiency' from [Hilton's] personnel file without his knowledge or consent."

This argument is meritless. First, nothing in the record indicates counsel for DWP did anything improper. The page from the Practical Dog Safety Training manual was part of the notice of suspension that Hilton's supervisor sent him in October 2012, which DWP submitted in support of its motion for summary judgment, and Hilton cites no authority suggesting DWP or its counsel had any obligation to submit the remaining pages of the manual. The documents Hilton contends DWP improperly removed from his personnel file without his knowledge or consent were in fact removed at Hilton's request, which his former counsel made to counsel for DWP in September 2016.

Moreover, a final judgment may be set aside for fraud on the court only if "'extrinsic factors have prevented one party to the litigation from presenting his or her case.'" (*Starpoint Properties, LLC v. Namvar* (2011) 201 Cal.App.4th 1101, 1110; see *In re Marriage of Park* (1980) 27 Cal.3d 337, 342; *Groves v. Peterson* (2002) 100 Cal.App.4th 659, 665.) In ruling on DWP's motion for summary judgment, the trial court had before it the evidence Hilton alleges counsel for DWP improperly concealed. As noted, the court granted Hilton's request for judicial notice of the Practical Dog Safety Training manual, and DWP presented copies of the documents removed from Hilton's personnel file in support of its reply brief on the motion for summary judgment. There is no evidence DWP or its attorneys did anything to prevent Hilton from presenting his case.

DISPOSITION

The judgment is affirmed. Hilton's motion for judicial notice is denied as unnecessary to our decision. (See *City of*

Grass Valley v. Cohen (2017) 17 Cal.App.5th 567, 594, fn. 13.) DWP is to recover its costs on appeal.

SEGAL, J.

We concur:

PERLUSS, P. J.

ZELON, J.